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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 502

UNION LEADER CORPORATION,
PETITIONER,

v.

THE HAVERHILL GAZETTE COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is not yet reported but is printed in

Appendix A to this petition. The opinion of the United States District Court for the District of Massachusetts is reported at 218 F. Supp. 487. The Report of Special Master Derek Curtis Bok, which was adopted by the District Court, is printed in Vol. I, 176-239, of the Certified Record filed herewith.

Prior opinions in this case are reported at 180 F. Supp. 125, 284 F.2d 582, 365 U.S. 833, 292 F.2d 381 and 368 U.S. 297.

Jurisdiction

The judgment of the Court of Appeals was entered on June 8, 1964. Petitioner's request for rehearing was denied on June 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

I. Whether the Court of Appeals, in a private treble damage antitrust action, erred in refusing to accept the facts found by a special master and adopted by the District Court, even though such facts were based almost exclusively upon oral testimony.

II. Whether the Court of Appeals erred by holding that, under collateral estoppel, a finding of a violation of the antitrust laws required a finding of substantial damages in the subsequently tried damages phase of the action.

III. Whether the Court of Appeals erred in relieving respondent of the burden of proving that antitrust law violations of petitioner were a proximate and substantial cause of damage to respondent.

IV. Whether the Court of Appeals erred by permitting respondent to violate the antitrust laws in defense against petitioner's violations and in combining with others to exclude petitioner from a newspaper market to the public detriment.

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§1 and 2, and Sections 4, 7 and 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §§15, 18 and 26, all of which are set forth in Appendix B to this petition.

Statement of the Case

On January 13, 1959, petitioner, Union Leader Corporation, brought the suit involved herein in the United States District Court for the District of Massachusetts. Named as defendants were the respondent, The Haverhill Gazette Company (Gazette), Newspapers of New England, Inc., (NNE) which had acquired all of the stock of the Gazette and some twenty-five New England newspaper publishers who had organized NNE for the purpose of buying the Gazette. Petitioner complained that the defendants had

violated §§1 and 2 of the Sherman Act to its past and continuing damage. The defendants were charged with combining to monopolize the Haverhill, Massachusetts newspaper market by excluding the competition of the Haverhill Journal (Journal) published by petitioner and further combining to prevent petitioner from publishing newspapers in other New England areas served by the papers of the defendant stockholders of NNE. Additionally, petitioner complained that the business of the Journal was restrained by rate discriminations practiced by the Gazette.[1]

The respondent Gazette filed a counterclaim in which it alleged that petitioner had violated the antitrust laws by rate discriminations practiced by the Journal and by combining with some eight Haverhill merchants to monopolize the Haverhill newspaper market to the exclusion of the Gazette.

The case was assigned for all purposes to the Honorable Charles E. Wyzanski, Jr. Before trial, Judge Wyzanski entered an order separating the issues of liability and injunctive relief from the damage issues, expressly reserving the hearing of "evidence with respect to any issue of damages until each party has had a full opportunity to exhaust his right of appeal with respect to such finding of liability." (IR, Vol. I, 87).[2]

After trial to the District Court without a jury, it entered its findings of fact, conclusions of law and issued an injunction. The District Court dismissed the complaint

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[1] The pleadings in this case were not printed by respondent in the record which it supplied the Court of Appeals and which led to the judgment now appealed from. However, they may be found in the records of this Court in Docket No. 658, October Term, 1960, Vol. I, 8-80.

[2] References to the record in the instant petition are designated R, whereas references to the record in the petition on file as 658, October Term, 1960 are designated IR.

as to NNE and its stockholder defendants. The District Court found that both the Gazette and the Journal had engaged in advertising rate discriminations and had attempted to monopolize the Haverhill market. Accordingly, the District Court ordered both papers to publish advertising rates and to adhere to them. Both parties were also enjoined from attempting to monopolize. Petitioner, Union Leader, was enjoined from continuing its past relationship with the eight Haverhill merchants. (IR, Vol. I, 1101-06).

Upon cross appeals, the Court of Appeals for the First Circuit affirmed the liability finding as to petitioner's conduct, but reversed as to that of the Gazette on its own finding of fact, unsupported by any District Court finding and contradicted by the evidence, that the Gazette acted only in self-defense after the Journal initiated discriminatory rates. (284 F.2d 582).

At this phase of the litigation this liability decision still stands as this Court denied Union Leader's petition for review of the liability judgment of the Court of Appeals. (365 U.S. 833).

At or about this stage of the proceedings, petitioner learned of manifestations of hostility directed against it by the District Judge both in and outside of the courtroom. An affidavit of prejudice was forthwith filed by petitioner and ordered "struck" on the day of filing by the District Judge. The Court of Appeals allowed petitioner's motion for leave to file a petition for a writ of mandamus seeking disqualification of the District Judge. In subsequently refusing to issue the writ, the Court of Appeals criticized the District Court's lack of restraint but concluded that although he may have sounded prejudiced, he really was not. *In re Union Leader Corporation*, 292 F.2d 381, 391, 392. This Court denied Union Leader's petition for a writ of certiorari. (368 U.S. 297). All relevant papers are on

file with the Clerk of this Court as No. 435, October Term, 1961.

The trial of the issues relating to damages had in the meantime been referred to a Special Master, Professor Derek Curtis Bok of Harvard Law School, (Appendix C hereto). As had been previously ordered by the District Court, the Gazette filed schedules of its damages claims with the master. These claims covered alleged loss of fair market value of the Gazette, losses of advertising from the eight merchants associated with the Journal, losses of advertising from a J. M. Fields concern, losses of advertising from certain merchants said to have been improperly influenced by the eight merchants and losses of advertising said to have resulted from advertising discriminations practiced by the Journal. (R, pp. X1-X96).

The master presided over the lengthy trial which occupied some thirty courtroom days at which some sixty witnesses were examined by counsel, and at some length, by the master. Except for the schedules filed by the Gazette, documents constituted a small part of the evidence received by the master.

The master filed a report which found against the Gazette as to all claims except as to the advertising placed exclusively in the Journal by the eight merchants. As to that Gazette claim the master found damages in the amount of $29,441.99 before trebling. The District Court adopted the report of the master, awarded the Gazette costs and counsel fees of $68,000 and entered judgment in its behalf in the amount of $156,325.97. (R. Vol. 1, 603, 604.)

Both parties appealed from the judgment. Petitioner charged as error the refusal of the District Court to permit it to establish that it had been prevented from entering the wider New England market by the Gazette, NNE and NNE members acting in concert. Petitioner also contended that the District Court awarded excessive counsel fees. The

nub of the Gazette's appeal was that the damages allowed were inadequate.

The Court of Appeals dismissed petitioner's appeal but upheld that of the Gazette, reversing the judgment of the District and remanding the case for new damage hearings in the light of its opinion.

Petitioner requested the Court of Appeals to stay its mandate and, when that motion failed, to recall it in order that petitioner might file a petition for a writ of certiorari with this Court before being required to participate in new damage proceedings. The Court of Appeals denied the motion for recall. Upon receipt of the mandate the District Court immediately appointed a new master but before hearings began, the master requested leave to resign because of a conflict of interest. The request was granted by the District Court. Gazette enforced execution for its costs.

In petitioner's application to Mr. Justice Goldberg, the mandate of the Court of Appeals was stayed and petitioner was given until September 15, 1964 to file its petition for writ of certiorari with this Court.

Reasons for Granting the Writ

1 The Court of Appeals Did Not Consider Itself Bound by the Facts Found by the Master and Adopted by the District Court, Even Though Such Facts Were Based Almost Exclusively Upon Oral Testimony.

In a nonjury action tried to a special master, such as the instant case, the District Court is bound by the facts found by the master. This is specifically provided by Rule 53(e)2 of the Federal Rules of Civil Procedure, as follows:

> In an action to be tried without a jury the court *shall* accept the master's findings of fact unless clearly erroneous. [emphasis supplied]

Thus this Court, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689, recognized the integrity of a master's findings of fact, as follows:

> This was purely a factual issue. The master made his findings in this respect through the weighing of conflicting evidence, the judging of the reliability of witnesses and the consideration of the general conduct of the parties to the suit . . . Our examination of the record leads us to acquiesce in these findings since they are supported by substantial evidence and are not clearly erroneous. And the court below correctly held that the District Court erred in failing to accept these findings . . .

If the trial court is thus limited, *a fortiorari*, the Court of Appeals is bound by the master's findings of fact.

The Court of Appeals acknowledged its duty to accept the facts found by the master, but excused itself from doing so on the theory that collateral estoppel bound the master, and he was not free to find the facts, despite the crystal clear order of reference by the District Court to the master to hear "all issues of damages, . . . find the facts."

In reversing the judgment of the District Court based upon the report of the master, the Court of Appeals did so largely on the basis of its disagreement with the master's findings of fact. The Court of Appeals did rule that the master had given insufficient heed to the doctrine of collateral estoppel. We shall deal with that ruling in Point II. However, a fair reading of the rather complex opinion of the Court of Appeals indicates that its action was governed by its own view of what the master should have found as fact from the evidence, mostly testamentary, which the master received.

The Court of Appeals, in its Opinion footnote 8, honestly

indicated that it had "great difficulty in understanding how the master reached" the factual conclusions. It substituted its personal evaluation of the liability findings for the master's evaluation of the evidence.

Nowhere is this disposition of the Court of Appeals more manifest than on page 10 of its opinion. There the Court of Appeals quarreled with the weight which the master gave to conflicting testimony and to the findings which he reached on three separate and important factual issues.

Thus, the Court of Appeals complained that "the master gave more open consideration to Union Leader Corporation's [petitioner's] evidence and the negative aspects of Gazette's than to the more favorable features of Gazette's case." Of course, it was the province and duty of the master to weigh the evidence and to judge the credibility of the witnesses who appeared before him under the order of reference. In discharging that responsibility, the master's report reflects a painstaking consideration of the evidence submitted by both parties. As to what the Court of Appeals calls the attention given by the master to the negative aspects of the Gazette's evidence, that was really the master's acknowledgment that the Gazette had failed to produce evidence on several points.

For example, as to the finding which the master made against the Gazette as to its claim concerning the advertising of J. M. Fields, he stated that "the facts summarized above have not been contradicted" by the Gazette. (R. 201). Again, as to the Gazette's claim that the union's distribution of the Journal shopper damaged it, the master said: "in fact, no evidence has been advanced to show that a single person was struck, let alone influenced, by the way in which the shopper was distributed." The master also called attention to the fact that the Gazette called as witnesses only two of the twenty-five merchants whom it claimed were improperly influenced by eight merchants in collaboration

with petitioner. (R. 213). As to the balance of the twenty-five the Gazette failed to call, the master specifically noted that failure. (R. 222).

Consequently, in considering the "negative aspects" of the Gazette's evidence, the master was merely observing a recognized evidentiary principle. That principle is that where a party fails to call available witnesses whose testimony would presumably be relevant to his claim, his failure supports the inference that their testimony would be unfavorable to him. *Interstate Circuit v. United States*, 306 U.S. 208, 226; *Chicago, M., St. P. & P. Co. v. Slowik* (C.A. 8, 1950) 184 F.2d 920; *Stoumen v. Commissioner of Int. Rev.* (C.A. 3, 1953) 208 F.2d 903.

Immediately following its criticism of the manner in which the master weighed the evidence generally, the Court of Appeals specifically objected to the fact that the master gave weight to the testimony of advertisers who, in the words of the Court of Appeals "could not, or would not, in 1962, recall that they were importuned by union members to use the Journal", but not, continued the Court of Appeals, to the contrary testimony from union representatives offered by the Gazette.

This is a typical instance where the Court of Appeals assumed, and at a considerable disadvantage, the fact finding powers of the trier of fact. The master's discussion of this subject is found at R. Vol. 1, pp. 192-195. It there appears that the Gazette produced not one advertiser who was influenced by a joint solicitation of union representatives and Journal advertising solicitors, in fact only two of the thirty advertisers called to the stand had even been visited by a union member. The rest of the thirty odd advertisers did not remember any union man soliciting advertising. (R. Vol. 1, 194). Two union members testified that some union members had introduced Journal advertisers to some merchants but the master found that their evidence

did not show any effect or results from the visits. (R. Vol. 1, p. 193). Finally, the master called attention to the fact that the Gazette signally failed to call the union participants in the solicitation and the merchants who were claimed to be influenced. (R. Vol. 1, 194). Hence, the conjecture of the Court of Appeals to the contrary notwithstanding, this is a situation where the master's findings were supported by the overwhelming weight of the evidence.

Next the Court of Appeals was offended at the weight which the master gave to the testimony of some thirty advertisers regarding the lack of contact with them by the eight merchants who were paid by Union Leader as consultants. There were admittedly conversations between some of the eight merchants and some other Haverhill merchants. However, the report of the master who heard all of the testimony makes it abundantly clear that, apart from the damages found by the master resulting from the exclusive advertising of the eight merchants in the Journal, no matter what intent was pursued by these eight they did not cause one iota of loss to the Gazette. (R. Vol. I, 212-224).

On that subject, the master noted several significant facts from the testimony which was presented to him. He pointed out that the Gazette saw fit to call only two of the twenty-five merchants who were allegedly influenced in their advertising decisions by visits from any of the eight merchants and by other advertising practices of petitioner. (R. Vol. I, 213, 222). He referred to the fact that petitioner called nine of the group of twenty-five and some twenty other advertisers who advertised almost exclusively in the Gazette. (R. Vol. I, 213). He found that, of the group of twenty not on the Gazette claims list, only one had been contacted by the eight and that one had, despite the contact, continued to give his advertising exclusively to the Gazette. (R. Vol. I, 214). He noted also that, of the eleven who were called from the Gazette's list of twenty-

five, only four remembered any conversations with any of the eight. (R, Vol. I, 214). The master concluded, after considering and weighing the evidence with respect to the four witnesses who were contacted by one of the eight merchants, that such contacts did not influence the newspaper advertising placement of the four to any degree. (R, Vol. I, 214-221). Finally, the master who heard these merchants testify, rejected the Gazette contention that they were unreliable. (R, Vol. 1, 223, 224).

In the face of the total lack of evidence to indicate that the eight merchants influenced other advertisers to patronize the Journal, it seems incredible that the Court of Appeals could have questioned the master's findings on the issue.

On the same subject, the Court of Appeals suggested that the eight merchants did influence other advertisers because the Court contends they were paid to do so and because they were promised more "if the Journal was successful in putting Gazette out of business". The Court ignores the fact that an intention not accompanied by effective action cannot give rise to an award of damages. The report of the master makes it crystal clear that the eight merchants were most ineffectual advertising solicitors—if indeed they solicited at all under the evidence in this case.

It is significant that the District Court which, unlike the Court of Appeals, heard some of the same witnesses as the master, adopted the master's findings. The District Court emphasized a point which the Court of Appeals seems to have overlooked. The District Court said, R. Vol. I, 601:

> Nor is there any warrant for criticising the Master because on certain issues of causation he reached findings which do not square with statements made by this Court and by the Court of Appeals in earlier

phases of this litigation. The Master, compared with us, had a far more comprehensive record of all aspects of causation which were of crucial importance in measuring the substantiality of the effect of Union Leader's wrongs upon Haverhill Gazette as a consequence of those wrongs.

In thus interjecting itself as a trier of fact in place of the master, the Court of Appeals has erroneously departed from the accepted rule that a master's findings must be accepted unless clearly erroneous.

The only logical conclusion for the reason the Court of Appeals ignored the master's findings of fact is that it disagreed with them, not that they were clearly wrong, or not even that they were wrong to any degree!

The Court of Appeals admitted its inability to point out a single erroneous finding of fact, but because of its displeasure with the judgment below, concluded ". . . we find it impossible to separate what findings were infected by error. We accordingly vacate the report in its entirety."

Fairness, law, logic and respect for the firm administration of justice dictate that the judgment based upon the scholarly and comprehensive report of the master adopted by the District Court should prevail over the judgment based on the ambiguous and erroneous opinion of the Court of Appeals.

The Court of Appeals compounded this error, to the prejudice of petitioner, by the manner in which it removed Professor Bok as the master in the case. The Court of Appeals said, as to the reasons for discharging Professor Bok, p. 10:

> . . . One may think one was not really wrong, and hence resist, consciously or otherwise, the new rules, or conversely, lean over backwards. Alternatively, if one

fully accepts the new principles it may be natural to over-emphasize them. . . .

Would not the new trier of fact, aware that the Court of Appeals did not trust a man of Professor Bok's caliber not to resist the "new rules", be more than apt to over-emphasize them?

It seems to us that the Court of Appeals has proceeded to reverse the judgment of the District Court due to a preconceived notion that, because petitioner was, with the Court's approval, enjoined from continuing certain practices, their use prior to the decree's entry must necessarily have caused the Gazette enormous losses. That concept misconstrues the purpose of an injunction which is to prevent future irreparable injury, even in the absence of past harm. *Swift & Co.* v. *United States*, 196 U.S. 375, 396; *Bedford Cut Stone Co.* v. *Journeyman Stone Cutters' Association*, 274 U.S. 37, 54; *Lorain Journal* v. *United States*, 342 U.S. 143, 153. More importantly, the full scale damage trial conducted by the master resulted in a complete refutation of the Court of Appeals views on the facts as to damages.

The intrusion into the fact-finding field by the Court of Appeals in the fashion expressed in its opinion merits reversal of its judgment.

II. The Court of Appeals Misapplied the Doctrine of Collateral Estoppel in Equating Violation of the Law with Impact and Damages.

Before the injunctive or so-called liability phase of the trial started, the District Court entered an order for a separate trial of all issues raised by the pleadings other than the issues of damages. The order also stipulated that if findings of liability were made, the Court would not hear

evidence with respect "to any issue of damages until appeals on the liability findings had been exhausted," (IR, Vol. I, 87).

Thus the parties were assured in advance of that first trial that they need neither advance nor meet evidence as to damages.

At the conclusion of that trial, the District Court entered a partial final decree which, in part, directed the parties to file damages schedules promptly thereafter. (IR, Vol. I, 1104).

In its opinion on the injunctive and liability aspects of the case, the Court of Appeals expressly recognized that the case had come before it "after trial on all issues except damages" and that the District Court had made no finding as to what portion of the Gazette's losses were attributable to the strike as distinguished from the Journal's competition. 284 F.2d 586, fn. 10.

Accordingly, when the master gave consideration to the extent by which he was bound by the fact findings in the original trial, he concluded that, although one District Court finding stood for the proposition that the Gazette had suffered substantial damage at the hands of petitioner, it did not require him to regard petition's wrongful acts as the sole or predominant cause of the Gazette's losses. (R. Vol. I, 178-180). He noted that the finding in question was unsupported by a detailed analysis in the District Court's opinion which was otherwise noted for precision and detail. (R. Vol. I, 179, 180). He buttressed this conclusion by noting the views expressed by the Court of Appeals as to the reservation of the damage issues which we referred to above.

Moreover, the master stated that even if the District Court's findings indicated that petitioner was responsible for the Gazette's losses, he was not bound by them under the doctrine of collateral estoppel. In his view, the only

possible relevance of a damage finding would be to the question of whether the Gazette was justified in resorting to anti-trust violations because it had been injured by petitioner's violations. He dismissed that as a valid consideration inasmuch as the District Court had ruled that the Gazette could not violate the antitrust laws defensively. Even as to the Court of Appeals' contrary ruling that the Gazette could practice price discrimination for protection, he pointed out that the Court of Appeals did not regard a showing of the precise extent of the harm caused by petitioner to be necessary to excuse the Gazette. (R, Vol. I, 180-182).

The master distinguished the decision of this Court in *Partmar Corporation* v. *Paramount Pictures Corporation*, 347 U.S. 89. He did so on the ground that in *Partmar* the prior finding was construed so broadly as to bar a later counterclaim, whereas in this case the prior finding had a limited meaning. As an additional ground for distinction, he stated that the prior finding in *Partmar* was essential to the decision in the earlier proceeding but that here, even if broadly construed, the prior finding was not essential. (R, Vol. I, 182).

In adopting the master's report, the District Court, which had made the earlier findings and which had issued an injunction based thereon, stated that the master was not constrained by prior actions of the District Court and the Court of Appeals. The District Court held that damage issues had been reserved, that the prior judgment determined that the petitioner's invasion of Gazette's rights had caused it some damage, but that nothing in the judgment determined whether particular conduct of petitioner had a substantial or indeed an appreciable effect upon the Gazette. (R, Vol. I, 601, 602).

Upon appeal, however, the Court of Appeals, which had previously acknowledged that damage issues had been re-

served, held that substantial damages to the Gazette by petitioner had to have been shown in the liability trial to justify its earlier holding that the Gazette could violate the antitrust laws in defense against similar violation by petitioner. (App. A, 33).

Thus, the decision of the Court of Appeals completely negated the District Court's reservation of the damage issues, which the Court of Appeals had earlier recognized to be the fact. First the courts below had lulled petitioner into believing that it was excused from resisting damage claims, then it is told that damage claims were being litigated to its disadvantage after all.

Apart from the manifest unfairness of the Court of Appeals' holding, it suffers from other infirmities.

First, the ruling of the Court of Appeals that the Gazette was justified in violating the antitrust laws in self-defense is plain error. It is direclty in conflict with *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons Co.*, 340 U.S. 211, 214. Its underlying basis has been rejected by this Court in other cases. *Sugar Institute* v. *United States*, 297 U.S. 553, 599; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467, 468. Hence, even if there was a finding of damage to support the self-defense plea, it was completely irrelevant to any proper issue in the case.

Secondly, the District Court explicitly rejected the self-defense plea. (IR, Vol. I, 1095, 1096). Consequently, the District Court did not have to, and did not, make any finding of damage by petitioner to the Gazette to support a legal conclusion which it declined to reach.

Thirdly, the master found that petitioner had damaged the Gazette to the extent of some $29,000. Although that sum may be considered dwarfed by the Gazette's astronomical claims, it is not exactly insubstantial viewed alone. It would seem, therefore, that the Court of Appeals, with-

out even having had the opportunity of hearing the damages testimony, is sending the case back to a new trier with, for all practical purposes, directions to find damages in excess of $29,000 in order to implement an invalid legal theory.

Finally, and most importantly, the Court of Appeals failed to observe the collateral estoppel doctrine in ruling that the master was bound to follow findings in the liability trial in his determination of damages. The issue of damages was not in issue, was not disputed and was not litigated in the liability trial. It is commonly held that only findings in a first trial which are litigated and essential to its decision are binding on a second trial of the same issues. *Cromwell* v. *County of Sac*, 94 U.S. 351; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, 598; *Yates* v. *United States*, 354 U.S. 298, 336; *The Evergreens* v. *Nunan* (C.A. 2, 1944) 141 F.2d 927, 929.

In defining collateral estoppel, this Court said in *Yates*: "That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." In *Evergreens*, Judge Learned Hand said that such a limitation was intended as "a protection, for it means that the issue will be really disputed and that the loser will have put out his best efforts."

In this case, the finding as to damages was not essential to the decision of the first trial, nor was the issue disputed at all because it had been removed from consideration.

Both in reasoning and result, this erroneous ruling of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *E. V. Prentice Machine Co.* v. *Associated Plywood Mills, Inc.*, (1958) 252 F.2d 473, cert. den., 356 U.S. 951. In that case defendant Associated had sent notices to purchasers of the Prentice machines that such machines infringed Associated's pat-

ents and that they would suffer the usual consequences if they persisted in using the machines. Whereupon, Prentice filed suit for a declaratory judgment that the Associated patents were invalid and, in that suit, it prevailed. Prentice next sought counsel fees on the ground that the infringement notices were sent by Associated in bad faith with the intent to cause loss to Prentice. In deciding in favor of Prentice on that issue, the District Court expressly found that Associated's infringement notices had effectively stopped sales of the Prentice machines.

Prentice then filed an action charging that Associated's sending of the infringement notices violated the antitrust laws and injured it in its business. Associated admitted that it had violated the antitrust laws but contended that the losses of Prentice were not due to the infringement notices but to other factors. On conflicting evidence, the District Court held that Prentice had not shown that its losses were due to the Associated notices and that the complaint should be dismissed.

On appeal, Prentice contended that the District Court was bound by the prior findings in the patent suit that the notices had resulted in damages. In rejecting that claim, the Court of Appeals said (477):

> The additional findings to the effect that the objectionable conduct had actually resulted in damage to Prentice were, therefore, not essential to that decision. This being the case, the doctrine of collateral estoppel by judgment does not bind Associated with respect to the prior findings on the question of damages.

The Court of Appeals acknowledged that Prentice had presented some evidence that its losses were caused by wrongful acts of Associated and that the trial court might

have inferred that proper causation had been established. However, it said as to that (479):

> But the trier of fact was not compelled to draw such an inference, where, as here, there was substantial evidence tending to show that the drop in appellant's business was due to other causes.

We submit that the rules announced in *Prentice* were correct and that those followed by the Court of Appeals here were wrong. On the issue of collateral estoppel, in the fetters with which it has restrained the trier of fact in determining damages, the Court of Appeals has committed prejudicial error.

III. The Court of Appeals Wrongfully Excused Respondent Gazette from the Burden of Showing by a Preponderance of the Evidence that Illegal Acts of Petitioner Union Leader Resulted in an Impact on Gazette which Caused Related Damage.

One of the reasons which may have moved the Court of Appeals to vacate the judgment of the District Court is its apparent belief that the master may have imposed too stiff a burden of proof upon the Gazette. We say "may have moved" advisedly because from the tentative character of its opinion, it is impossible to tell the precise point or points upon which the Court of Appeals based its reversal.[3] However, the Court of Appeals made reference to the fact that the master had used the phrases "sole or predominant cause" and "a more substantial cause of harm than any other known cause." The Court of Appeals ac-

[3] For example the Court of Appeals stated that: "Because of several of the matters discussed herein we find it impossible to separate what findings were infected by error." (App. A, 41).

knowledged that the master used these phrases in connection with only one Gazette claim and that he reached the proper conclusion with respect to that claim, but it suggested that the master might have used the same standard with respect to all Gazette claims. Therefore, the Court of Appeals concluded that the master had used the test of "most substantial" rather than "substantial." (App. A, p. 38).

Passing the sheer speculation to which the Court of Appeals resorted to read the mind of the master, the plain fact is that the master's report shows that the Gazette did not meet the most minimum test in attempting to prove that unlawful acts of Union Leader caused its losses, except in the case of the advertising of the eight merchants where the master found for the Gazette.

Thus with respect to the claim that joint solicitation of advertisers by the union and the Journal, the master found from the evidence which he fully reviewed "that the fact of damage has not in any sense been established." (R, Vol. I, 195). As to the J. M. Fields advertising, the master stated that the facts which he summarized had "not been contradicted" by the Gazette. (R, Vol I, 201). On the question of whether the eight merchants had in fact obtained advertising for the Journal, the master's report shows that the Gazette did not produce a single advertiser to testify that he had been influenced by such solicitation and therefore the master stated that he could not find "improper influence in the case of such of these advertisers as were contacted by members of the eight." (R, Vol. I, 212-223). Similarly, where the Gazette failed to produce testimony that the subsequent advertising of merchants who had received discriminatory benefits from the Journal and the advertising statistics belied such influence the master stated that he could not "but conclude that the wrongful acts of

ULC had no effect upon the advertising of these merchants." (R, Vol. I, 212-222).

This then is not a case where the master imposed an undue burden on the Gazette in measuring the dollar amount of its damages after the fact of damage had been shown. It is not within the ambit of the statement of this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264, 265, that the trier of fact "may make a just and reasonable estimate of the damage based upon relevant data, and render its verdict accordingly." The master's report raised no issue as to the manner in which the Gazette measured its damages, except to an insignificant extent on that claim where the master awarded damages to the Gazette.

This rather is a case where the Gazette failed to establish causation between its losses and unlawful acts of petitioner. The evidence which the Gazette produced to prove such causation was at best insubstantial—if not entirely ephemeral. Thus, the Gazette failed to meet the requirements of establishing that its losses were the "certain result of the wrong" as announced by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 562. While an antitrust plaintiff may have great latitude in proving the *amount* of his damages, he is held to the duty of proving the *fact* of damage flowing from unlawful acts of the defendant with reasonable certainty. *Flintkote Co.* v. *Lysfyord* (C.A. 9, 1957) 246 F.2d 368, 392, cert. den. 355 U.S. 835.

Lest this Court speculate that if the Gazette's losses were not due to unlawful acts of petitioner how did they arise, we hasten to add that there were other causes. Thus the District Court found as a fact that the Haverhill community could not profitably support both the Gazette and the Journal even in the absence of illegal actions. (R, Vol. I, 1069). In its opinion in the first case, the Court of Appeals recognized that the strike at the Gazette could well have been as much the cause of the Gazette's losses as

the competition of the Journal. (284 F.2d 582, 586).[4] Furthermore, there was considerable question as to the capacity of the Gazette's management before it was purchased by NNE. Although the master refused to comment on the old Gazette management, he pointed out that the improvement in the Gazette after the change in ownership may have been brought about by the new management rather than by petitioner's cessation of unlawful acts. (R, Vol. I, 232). There was uncontradicted testimony at the damage hearings from Gazette representatives that the Gazette suffered from mismanagement and poor public relations from the time of the Journal's entry into Haverhill until the Gazette was taken over by NNE. (R, Vol. III, 1315-1324; 1376-7, 1415).

In suggesting probable causes of the Gazette's losses, we do not concede any obligation on the part of petitioner to explain them. Petitioner's only responsibility is to defend the claim that its unlawful acts were a substantial cause of them. The master, who received the evidence, found that petitioner had discharged that responsibility except as to one claim.

In summary, the Court of Appeals, while paying lip service to the rule that the Gazette had to show that petitioner's unlawful conduct was a substantial cause of its losses, in fact held the Gazette to a much less stringent standard. In view of the master's report which showed that the Gazette had not met the "substantial" test, the Court of Appeals has for all practical purposes allowed

[4] It is of more than passing interest that Judge Aldrich who wrote this opinion of the Court of Appeals had previously had occasion to pass on the same strike as a District Judge in *N.L.R.B.* v. *I.T.U.* In that case at 161 F. Supp. 431, 432, he enjoined the union from insisting on certain conditions to collective bargaining and, as a basis therefor, he found that the union had caused irreparable injury to the Gazette. There he found that the Journal was by no means fully responsible for the Gazette's ills and he noted also that newspapers were unable to withstand much direct competition.

the Gazette to establish its claims by a mere scintella of evidence. This was error. The judgment of the District Court based upon the master's report should have been affirmed.

IV. The Original Finding of Liability Against Union Leader Was Entered and Affirmed by Courts Allegedly Biased Against Petitioner and Its Principal Officer, and It Was Predicated on Nonexistent Evidence and an Incorrect Principle of Law Which Has Been Specifically Rejected by This Court.

Petitioner assumes that its petition for a writ of certiorari in No. 658, October Term, 1960 was denied because the posture of the entire case was not then ripe for appeal. The Court of Appeals indicates in its Opinion on damages that the prior decree on liability was interlocutory. (App. A, p. 32)

Even if the posture is not now ripe, the judicial history of this litigation, in which petitioner has yet to receive that equal justice under the law to which all are entitled, dictates that this Court at this time intervene and determine the real issue.

In the prior petition (No. 658, October Term, 1960, pp. 2, 3) Union Leader raised the issue as to whether a syndicate of some twenty-two newspapers could legally combine to prevent Union Leader's Journal from gaining entrance into Haverhill against the Gazette, an existing monopoly newspaper, where part of their motives were to protect their existing monopolies in other New England cities and where their Haverhill practices violated the antitrust laws.

The Court of Appeals ignored their intent to monopolize and excused their acts of monopolization as defensive against similar acts. The Court of Appeals ignored the evidence which showed that the Gazette initiated price dis-

criminations, and found on its own that the Journal had initiated them. (Petition in No. 658, October Term, 1960, pp. 6, 7).

Not only did the Court of Appeals put the shoe on the other foot, it then ignored the clear holdings of this Court that one cannot take the law into his own hands and violate the antitrust laws in defense against another violator. Both public and private enforcement through the Courts are available. Any other rule, such as that set by the Court of Appeals, would lead to lawless retaliation.

In the supervisory capacity of this Court over the administration of justice, this Court should review the entire case. It involves freedom of newspaper competition, now vanishing to the point of extinction, and is thus a case of great public importance.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 6175.

THE HAVERHILL GAZETTE COMPANY,

APPELLANT,

v.

UNION LEADER CORPORATION,

APPELLEE;

No. 6191.

UNION LEADER CORPORATION,

APPELLANT,

v.

THE HAVERHILL GAZETTE COMPANY,

APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[218 F. Supp. 487]

[218 F. Supp. 490]

Before HARTIGAN and ALDRICH, *Circuit Judges*,
and GIGNOUX, *District Judge*.

Robert H. Goldman, with whom *Frank Goldman*, *Joseph F. Bacigalupo*, and *Goldman, Golaman & Curtis* were on brief, for The Haverhill Gazette Company.

James M. Malloy and *Ralph Warren Sullivan*, with whom *Malloy, Sullivan & Sullivan* was on brief, for Union Leader Corporation.

OPINION OF THE COURT

June 8, 1964.

ALDRICH, *Circuit Judge*. These cross-appeals by the Haverhill Gazette Company (Gazette) and Union Leader

Corporation (ULCo) from a final judgment in Gazette's favor following the confirmation of a master's report mark the third time this case has been before us. In *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 1 Cir., 1960, 284 F.2d 582, *cert. den.* 365 U.S. 833, we affirmed a decree granting an injunction against ULCo forbidding certain conduct in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, but vacated the decree insofar as it granted relief in ULCo's favor. In *In the Matter of Union Leader Corp.*, 1 Cir., 1961, 292 F.2d 381, *cert. den.* 368 U.S. 927, we affirmed the action of the district judge in charge of the case in refusing to disqualify himself in response to an affidavit of prejudice. Following this the district court referred the suit to a special master for a determination of the damages caused Gazette by ULCo's wrongful conduct. The master found single damages in the amount of $29,442. The court overruled Gazette's objections to the report and entered a judgment in Gazette's favor for $88,326 (the trebled amount) together with $60,000 as statutory attorneys' fees and $8,000 expenses. Gazette's appeal alleges the damage findings to have been grossly inadequate. ULCo appeals from the award of counsel fees. It also objects to the failure of the court to consider one of the grounds on which it claims that Gazette, or more exactly the purchaser of all of Gazette's common stock, Newspapers of New England, Inc.,[1] and others, were themselves guilty of violating sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act, 15 U.S.C. §18. This opinion will be concerned only with Gazette's appeal.[2]

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[1] Since renamed Haverhill Publishing Co., Inc.

[2] In view of our present disposition, the size of the award of counsel fees becomes moot, as doubtless the court will wish to reconsider that matter at a later date under the new circumstances. With respect to ULCo's contention as appellant on the merits, this is something that, so far as this litigation is concerned, should have been presented on the original appeal from a judgment, finding no liability and denying relief

The facts, many of which were recited in detail in our first opinion, will be referred to in part as we proceed. The basic fact we now start with is that Gazette entered the damage hearing with comprehensive findings in its favor indicating serious and continuous illegal activity of many sorts by ULCo over a period of years, and "stupendous losses," whether or not as a result of ULCo's wrongdoing, and wound up with a finding of damages in an amount of comparative insignificance.[3] Gazette contends, inter alia, that this resulted from the master's erroneously "compartmentalizing" the issues, citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 1962, 370 U.S. 690, and placing too severe a burden upon it as to each item and, further, by disregarding the findings of the district court. ULCo, on the other hand, takes the position that the findings of the master are to be accepted unless plainly wrong, and that they were not.

Because it has an important bearing on precisely what was before the master and the scope of the inquiry open to him, we must consider the prior proceedings with some particularity. At the time of the referral the posture of the case was superficially usual, but actually highly unusual. The issues initially tried to the court were stipulated to be "every issue pertinent to the granting or refusing of an injunction," and "every issue of liability." The trial,

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as to the relevant separate claims, which was specifically stated by the district court, upon the determinations required by F.R.Civ.P. 54(b), to be final. *Cf. Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427; *Cold Metal Process Co.* v. *United Eng'r & Foundry Co.*, 1956, 351 U.S. 445; *Bendix Aviation Corp.* v. *Glass*, 3 Cir., 1952, 195 F.2d 267. We do observe, however, that ULCo's brief appears to rest upon a misconception of the district court's pretrial statement. The court did not say that "any evidence proferred as to an outside market would be excluded," but merely indicated that it was "probable" that it would regard such evidence as unnecessary. This was not a ruling on which one could base rights. We will not now consider whether the matter in question was as fully tried out as it could have been.

[3] ULCo's brief describes it as "relatively microscopic."

exclusive of substantial preliminaries, lasted two weeks. It resulted in an opinion containing a comprehensive summary of findings, pursuant to which the court entered a "Partial Final Decree." Consistent with the stipulation the decree recited,

> "11. Pursuant to Rule 54 of the Federal Rules of Civil Procedure, 28 U.S.C., this Court expressly determines that there is no just reason for delay in entering final judgments on the following claims:
>
> . . . .
>
> all claims for injunctive and declaratory relief. . . ."

It thereupon entered "final judgments" with respect to all paragraphs of its order except the reserved damage claims. It added,

> "However, if an appellate court should regard these orders not as final but as interlocutory, and if the parties would not have the benefit of the appeals available under 28 U.S.C. §1292 (a)(1), this Court, in accordance with 28 U.S.C. §1292(b), is of the opinion that the orders in paragraphs 1, 2, 3, 4, 5, 8, 9, 10, and 11 involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Our first opinion did not discuss the question whether, or to what extent, the partial decree was final or interlocutory. In its order of reference, following our affirmance, the district court stated, "The only issues now being left for adjudication relate to damages. These are precisely analogous to issues of damages which would be raised in patent, copyright, and like cases following an appellate adjudication on issues of liability. Such cases are customarily referred to a Master for the ascertainment of damages."

It is here that the difficulties, and they are serious, commence. Except for the sometime question of increasing the damages because of the nature of the infringement, 35 U.S.C. §284 (a matter the statute reserves exclusively for the court in all cases), the issues of patent infringement and damages are separate and clear-cut. Although ascertainment of damages may involve difficult questions of apportionment, see, *e.g.*, *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills, Inc.*, 3 Cir., 1945, 147 F.2d 209, *cert. den.* 293 U.S. 595, there is no overlapping of the issues determined by the court, finally, 28 U.S.C. §1292(a)(4), and those referred. In a private antitrust action liability and damages are not separate. Granting that an injunction may require a finding of merely threatened loss, 15 U.S.C. §26, a partial decree on all issues of liability, however considered, implies much more. One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage.[4] See, *e.g.*, *Stearns* v. *Tinker & Rasor*, 9 Cir., 1958, 252 F.2d 589, 605-06, *cert. den.* 350 U.S. 830; *Freedman* v. *Philadelphia Terminals Auction Co.*, 3 Cir., 1962, 301 F.2d 830, *cert. den.* 371 U.S. 829; *Foster & Kleister Co.* v. *Special Site Sign Co.*, 9 Cir., 1936, 85 F.2d 742, 750, *cert. den.* 299 U.S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 4 Cir., 1934, 72 F.2d 885, 887. Indeed, the district court itself, in its opinion confirming the report, stated that its original judgment had "determined" that ULCo's "invasion [of Gazette's rights] caused Haverhill Gazette to suffer damages." The master at one point had recognized this determination, stating that a certain finding "embodie[d] a conclusion by the District Judge that the wrong-

[4] "[A]ny person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." Clayton Act §4, 15 U.S.C. §15 (ital. suppl.). Private antitrust actions are not founded upon showing of unlawful conduct only, but upon injuries, to the protected interests, which are the legal result of the overt illegal acts.

ful acts of ULC inflicted some substantial damage upon the Gazette." Yet although this was what the master said the court had found, and what the court agreed it had found, we discover that in its original opinion the court said that it was "not concerned with the assessment of damages, if any." The master, with similar ambivalence, stated that the reference permitted him full latitude to determine "the precise nature and scope of the damage," and a careful study of his report reveals that this meant to him, too, "damage, if any."[5]

Thus we have the situation of the district court's entering not merely a permanent injunction, but a decree of liability which it labelled final, following an apparent finding of damage which, legally, would seem a necessary prerequisite. Yet at the same time the master was thought free to find the damage, *if any*, untrammelled by what went before to the point, as the court put it in its opinion confirming the report, of making an "independent and fresh appraisal on factual issues of causation and damages." Indeed, so "independent" was the master that the court held that while "he reached findings which do not square with statements made by this Court and by the Court of Appeals," his findings must be accepted unless "clearly erroneous."

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[5] There were three principal matters involved in the court's decree; the improper use of union representatives in connection with calls by ULCo's advertising solicitors in which advertisers were urged to boycott the Gazette; secret rate and other advertising discriminations, and illegal contracts with the eight merchants, so-called, by which the merchants were to give all of their advertising to the Journal and were, posing as ostensibly disinterested parties, to boost the Journal and disparage the Gazette and persuade other businessmen to advertise exclusively in the former. The master found no damages whatever as a result of the first two illegal activities, and none with respect to the eight merchants except as to their own exclusive use of the Journal. Even as to this last the master carefully examined the evidence and indicated no awareness of any obligation, as the result of the court's prior findings, to find "substantial damages," or even any damages. We will deal with these matters later at more length.

However, there had become applicable, if the decree of liability is to be considered final, the principle of collateral estoppel, *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 1954, 347 U.S. 89, making, in effect, conclusive as between the parties the "essential," *Yates* v. *United States*, 1957, 354 U.S. 298, 336, prior findings. *The Evergreens* v. *Nunan*, 2 Cir., 1944, 141 F.2d 927, 65 Harv.L.Rev. 818, 842-43.

Enough has been said to demonstrate that at least insofar as the court's partial decree is regarded as final there are serious internal conflicts. While aspects of the decree must be accorded finality we think it preferrable under the circumstances to consider the decree of liability as merely interlocutory. This is the usual rule when liability is determined separately; a decree of liability which excludes damages is normally not a final decision. *The Palmyra*, 1825, 10 Wheat. 502; *Craighead* v. *Wilson*, 1855, 18 How. 199; *McGourkey* v. *Toledo & Ohio C. Ry.*, 1892, 146 U.S. 536; 6 Moore, Federal Practice ¶54.13 at p. 125 (2d ed. 1953); Restatement, Judgments §41 (comment a) (1942); *cf.* F.R.Civ.P. 56(c) expressly recognizing a summary judgment of liability alone as interlocutory. The Rule 54(b) certification, which was effective to make appealable under 28 U.S.C. §1291 the court's decision on claims finally disposed of, could not affect the interlocutory character of the partial disposition of the treble-damage claim.[6] See *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427, 435, 437; 6 Moore, *op. cit. supra*, ¶54.30[1], at p. 232 n.12.

On an interlocutory basis the court's findings as to damages, whether express or implicit, are subject to revision.

[6] That the judgment disposed of all issues on separate trial under F.R.Civ.P. 42(b) would, of course, affect neither finality nor appealability, *Atkins, Kroll (Guam), Ltd.* v. *Cabrera*, 9 Cir., 1960, 277 F.2d 922. We find it unnecessary to determine whether our jurisdiction on the prior appeal to review the decisions of liability was based upon 28 U.S.C. §1292(b), or upon the broad principle recognized in *Smith* v. *Vulcan Iron Works*, 1897, 165 U.S. 518.

However, as to one issue there has been a final judgment, and with respect thereto collateral estoppel must apply. Our decision on the first appeal ordering ULCo's complaint dismissed was upon the ground that the district court's finding of substantial advertising discriminations, dealt with on proper principles, amounted, on the court's subsidiary findings, to legal justification for defensive retaliation in kind by Gazette. This dismissal constituted, inescapably, a final judgment, *cf. Smith* v. *Vulcan Iron Works*, 1897, 165 U.S. 518, and ULCo stands bound by the essential underlying factual determination. At the outset of his report, after discussing this issue, the master correctly concluded that with respect to discriminations the record stood that "the wrongful acts of ULC inflicted some substantial damage upon the Gazette." However, seemingly because of an interpretation which we could not agree with [7] he concluded that collateral estoppel was inapplicable, and that *Partmar* was "disposé[d] of." We can not agree. The finding of substantial damage done to Gazette by ULCo's acts of discrimination was essential to the judgment dismissing ULCo's original action. This finding must remain for all purposes of the case. The dollar amount, of course, was not found, or even that this damage was ascertainable in dollars, but that is something else.[8]

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[7] The master felt that although there was a finding that damage was "inflicted" upon Gazette, this was not a finding "that ULC's wrongful acts were the sole cause or even the predominant cause of injury." Passing the question of just what injury this meant, and whether it expressed a proper standard of causation, a matter considered more broadly *infra*, it cannot be that the court's finding of substantial harm to Gazette as a result of ULCo's discriminations meant harm for which ULCo was not legally responsible.

[8] We might say, in passing, that quite apart from the binding effect of the court's finding that Gazette was injured by ULCo's discriminatory conduct, we have great difficulty in understanding how the master reached his contrary factual conclusion. To take, as one example, the J.M. Fields matter, which the court has described as "most important," and a "serious discrimination," this involved, in part, a discriminatory

Although we conclude that with respect to ULCo's other illegal activities the master was free to find facts overriding the court's decree of liability construed as interlocutory only,[9] it does not follow that the present report in this regard is to be accepted. In the first place, we do not agree that the "clearly erroneous" rule applies uniquely to the master's findings. Rather, the prior findings of the court were themselves entitled to consideration, and there was a burden on the master to be met before finding as to any issue embraced in or underlying the earlier decree, even though interlocutory, that the court was wrong, a burden which neither he, nor the court subsequently, recognized.[10] Furthermore, we find it difficult to agree with the court in its opinion confirming the report that the master had not

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guarantee not to raise the rate for two years, which the master found was "a substantial factor" in taking the business from Gazette. The master nevertheless found no damage, not merely that he could not measure it. As an "important" reason the master referred to the fact that the guarantee was never exercised. We do not follow the reasoning, and without going into details, we do not understand the findings. We would ask, *inter alia*, what was ULCo's point, on the master's analysis, of giving the guarantee at all?

[9] There are a number of circumstances, notably the reception of new evidence, under which our affirmance of the interlocutory decree would not constitute a bar to redetermination of the question of liability in the court below. See, *e.g.*, *Toucey* v. *New York Life Ins. Co.*, 8 Cir., 1940, 112 F.2d 927, 928, *rev'd on other grounds*, 314 U.S. 118; *Western Fire Ins. Co.* v. *University City*, 8 Cir., 1942, 124 F.2d 698; *cf. Alexander* v. *Nash-Kelvinator Corp.*, 2 Cir., 1959, 271 F.2d 524, 526.

[10] One of the fundamental difficulties in this case, which we do not fully reach because the parties did not question the propriety of reference vel non, is the extent to which the master, as a different trier sitting on the damage hearings, not only could take new evidence, but could give different weight to evidence or make very different findings of credibility. Where the issues are to some extent interwoven or overlapping in such separate proceedings this may cause grave difficulties. See, *e.g.*, *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 1931, 283 U.S. 494, and *United Air Lines, Inc.* v. *Wiener*, 9 Cir., 1961, 286 F.2d 302, *cert. den.* 366 U.S. 924 (involving, additionally, questions of right to jury trial). Under present circumstances we adopt the rule above stated.

been unduly hard to convince. By this we mean that we are not satisfied that he did not charge himself erroneously. Certainly he did not vocalize our caveat in *Momand* v. *Universal Film Exchanges, Inc.*, 1 Cir., 1948, 172 F.2d 37, at 43, 42, *cert. den.* 336 U.S. 967, that while "a fair degree of certainty is still essential to show the causative relation of defendant's misconduct and plaintiff's injury," yet "in an antitrust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless." It is more than arguable that he did not apply it. At the least it can be said that in discussing the evidence the master gave more open consideration to ULCo's evidence and the negative aspects of Gazette's than to the more favorable features of Gazette's case. The fact, for example, that various advertisers could not, or would not, in 1962, recall that they were importuned by union members to use the Journal and not the Gazette, received much attention, and the contrary testimony of the representatives none. Similarly, the advertisers' testimony regarding lack of contact by the eight merchants, so-called, whom the court found Loeb illegally and "immorally" hired to act as apparently disinterested solicitors, was emphasized to the extent of not even referring to the testimony of some of the merchants themselves that for a period of nearly twenty months they spent, individually, up to forty hours a week making such contacts.[11] Nor did the master deal with the likelihood that the eight merchants did exactly what they said they did, not merely because they were paid, collectively, some $30,000 by Loeb for so doing, but because they were promised $1,000,000 and a quarter interest in the Journal if the Journal was successful in putting Gazette out of business. This truly extraordi-

[11] We do not think it necessary to distinguish to what extent the merchants may have "talked-up" the Journal as opposed to soliciting specific advertising or obtaining actual contracts.

nary contract, and what might seem to be inevitable consequences, was dismissed in silence as the master concluded that (beyond effects on advertising of their own enterprises) the merchants' activities were so inconsequential as not to produce a single dollar.[12] While there is no obligation to discuss all of the evidence, *cf. United States* v. *Yellow Cab Co.*, 1949, 338 U.S. 338, 340-42, in total this was a substantial omission, particularly in the light of what had apparently been previously credited by the court. It is also relevant in view of our doubts as to the burden the master placed upon Gazette.

These other doubts take form because of the master's frequent use of the phrases "sole or predominant cause," and "a more substantial cause of harm than any other known cause." While he did this only in connection with rejecting, at the outset of his report, Gazette's interpretation of one particular statement in the court's opinion, and the master's ultimate conclusion was correct,[13] his use of and reliance upon this standard of causation was wrong. The fact that he never enunciated another strongly suggests that he may have employed the same standard throughout his report.

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[12] No mention, either, was made of the court's finding that the result of this contract was "to intensify . . . zeal . . . to support The Journal by securing advertising for it and to discourage advertising in The Gazette by . . . enterprises subject to their influence," and Loeb's significant testimony. "XQ. And they assured you they would get as much advertising business for you as they possibly could, didn't they? A. Yes. XQ. And they did that, didn't they? A. Yes." If in this vital matter Loeb was not merely misled, but totally mistaken, we think it was at least incumbent on the master to explain his mistake.

[13] The court had stated that Gazette "had been put in peril of insolvency in the equity sense as a result of ULC's attempt to monopolize." Gazette endlessly seeks to magnify this. While, conceivably, the court's language was inexact, it is obvious that ULCo was not the sole cause of Gazette's difficulties, and that Gazette's construction is not only inconsistent with the facts, but with the entire balance of the court's opinion.

In using this standard the master purported to rely upon the decision of the district court in *Momand* v. *Universal Film Exchanges, Inc.*, D.Mass., 1948, 72 F. Supp. 469, noting that the judgment had been affirmed. He failed to note, however, that "sole or predominant" was not the rule that we stated on the appeal.[14] Judge Goodrich, speaking for the court, returned to the Restatement and said, 172 F.2d at 43, "[T]he usual rule in tort is that a plaintiff may recover for loss to which defendant's wrongful conduct substantially contributed, notwithstanding that other factors contributed also. Restatement, Torts § 431 (1934)." The difference between a "substantial" cause and one "more substantial than any other" is manifest. If the master put a burden on Gazette, as it may well be he did, to eliminate all proper causes for the shifting of advertising from Gazette to the Journal to the extent of affirmatively showing that the illegal causes were the sole or most substantial, we consider this too favorable treatment of a deliberate wrongdoer. If anything is clear in this case it is that the Gazette's union difficulties in a strongly union area were what furnished ULC'o the opportunity to initiate and continue the Journal.[15] From the outset it capitalized upon this by illegal means, purposely and effectively designed to take advertising from the Gazette. After the strike was settled (and passing the question of whether ULC'o's con-

[14] It is perhaps not altogether clear what the district court held. It is true that it did use the second of the two phrases quoted *supra*. However, the opinion began with a reference to section 912 of the Restatement of Torts to the effect that what was required "was proof that the tortious conduct was a substantial factor in causing such harm," 72 F.Supp. at 478, a much lesser requirement. Elsewhere the court stated that "if segregation and admeasurement of cause of loss were impossible" (seemingly apposite, on the master's opinion, to the case at bar, see *infra*) various phrases might be used to define the burden of showing causality, including "preponderant," "dominant," "main," or "a substantial," and that it would not "try to decide which of the quoted phrases is correct . . . ."

[15] See fn. 17, *infra*.

duct may not have extended the date) ULC'o engaged in massive illegal assaults upon Gazette's advertisers, discussed *supra*, which were considered, in ULC'o's opinion, at least, of such extraordinary value. Certainly they, too, were expressly designed to accomplish exactly the losses which Gazette in fact suffered. For ULC'o thereafter to be able to say, "Prove exactly what you lost and that it would not have been lost, anyway," would be to admit to a legal ineffectiveness that we should regret to contemplate. In our opinion it is enough to warrant the master in finding general damages that Gazette should show merely a substantial cause, rather than a cause more substantial than any other.[16] While the master considered finding general damages, and declined to do so, we cannot tell under what circumstances he contemplated it, and the burden he imposed upon Gazette. His reference to the principle enunciated in *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 1946, 327 U.S. 251; that the risk of uncertainty should fall upon the wrongdoer, had attached to it the condition that "the difficulties of proof [must be] . . . the result of ULC'o's unlawful

[16] "The degree of certainty required of a plaintiff in proving causation of damage . . . varies with the nature of the case." *Momand* v. *Universal Film Exchange*, *supra*, 172 F.2d at 42; see Note, The Requirement of Certainty in the Proof of Lost Profits, 64 Harv. L. Rev. 317, 319 (1950). A degree of uncertainty may always be permitted, especially when the circumstances make it particularly likely that the claimant suffered loss at the wrongdoer's hands. *Cf. Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 1946, 327 U.S. 251; Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363, 367-93 (1954); Note, Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L.J. 1010, 1016-19, 1025-26 (1952). In the antitrust case at bar uncertainty of cause is much less than it would be in the ordinary multi competitor situation because until the Journal appeared in this admittedly one-newspaper area Gazette had no competition, and if the Journal had ceased publication it would have reverted to that status. In a very arguable sense whatever the Journal took, particularly after the strike ended, Gazette lost. This is, in other words, a harsh case in which to conclude, after proof of substantial violations of the antitrust laws directed at the claimant, that there was an

acts," (which he found they were not). Particularly in the sense that he used it, this was a far too narrow reading of *Bigelow*.

We turn, finally, to Gazette's largest claim, that ULCo is responsible for all losses caused by the Journal's very existence because the Journal was founded upon, and continued in, unlawful conduct of a most substantial nature. The master recognized this as a valid issue and defined it at the outset of the report.

> "[I]t is conceivable that ULC would not have entered the Haverhill market, or remained there throughout the damage period, *had it not enjoyed the benefit of its own wrongdoing*. This possibility must be explored in order to make a thorough assessment of damages, for the early departure of the Journal from Haverhill would have materially improved the position of the Gazette." (Ital. suppl.)

It must be clear that whether any particular unlawful conduct was instrumental in causing the Journal to enter or remain in Haverhill must be determined by the effect that it had upon Loeb, ULCo's president and policymaker. If, in Loeb's mind, it was necessary to engage in particular

unsatisfied burden of showing any legal damages because of some rigid rule of causation. The question is not primarily one of showing damage, but one of the extent of damage where there are multiple causes, none susceptible to precise measurement, which are in source independent and yet interact upon each other in producing injury. We note in the Restatement of Torts (1939), relied upon broadly in *Monard*, and by the master as well, that in a case where the damages cannot be precisely calculated because of the interaction of concurrent causes, there is no burden of excluding all other causes of loss, and that estimates based upon such evidence as is "reasonably available" under the circumstances may be accepted. Section 912, illus. 12. See also comment d to that section. In fact, *Bigelow* suggests that the burden of excluding the effect of other causes may sometimes be upon the wrongdoer. See 327 U.S. at 264. Whether or when such a burden may be imposed is a difficult question which we find impractical to rule on without going deeply into evidentiary matters which have not been argued and which, conceivably, may not recur in the same form or context.

acts in order to warrant remaining in business, then, in the true sense, those acts caused his being in business. This must have been so regardless of whether, in point of fact, he was correct in his appraisal. If, for example, Loeb felt that it was essential to obtain illegal assistance from the union in order to continue in business, it follows that his decision to continue, and hence his continuing, resulted from his success in accomplishing this unlawful act. The question is not whether, viewed from hindsight, the union cooperation did him any essential, or, indeed, any material good.[17] The master made this analysis at the outset, and properly addressed himself to what was Loeb's state of mind when deciding whether to enter Haverhill initially, finding, on this issue, against Gazette. He then, however, abandoned this approach, and applied a strict benefit-received rule, viewed, moreover, not as he concluded Loeb viewed it at the time, but as it appeared to the master in the light of the damage testimony which he credited. The issue, he stated, was simply whether Loeb would have stayed had he in fact not received the specific advertising benefits which Gazette had succeeded in establishing to the master's satisfaction.

Passing the extent to which the master erred in finding these benefits too small, the ultimate question must be not what benefits the master found in 1963, but what Loeb thought in 1958 and 1959. Moreover, even if Loeb's ap-

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[17] Launching a newspaper, as Loeb himself testified, is a very difficult undertaking, particularly at Christmas. Loeb himself was surprised at his success. The fact that Gazette's printers were on strike, with Haverhill being a particularly strong union area, was certainly a significant factor. It was not a factor attributable to Loeb. However, under these circumstances Loeb's subsequent capitalization on Gazette's union difficulties to the extent of obtaining specific unlawful union assistance (we agree with the master in not holding ULCo responsible for the union's independent activity on a theory of conspiracy) must have been regarded by him as highly important, if not vital, to his continuance.

praisal of the affirmative dollar benefits received coincided exactly with the master's, it still may have been that he believed that his losses would have been greater but for his illegal activities, or persistently took an optimistic view that matters would improve, which, absent these activities, he would not have entertained. The master's substantial misinterpretation and limitation of this issue was clear error.

There must be a new trial. Because of several of the matters discussed herein we find it impossible to separate what findings were infected by error. We accordingly vacate the report in its entirety. Furthermore, we believe that the damage issues should be submitted to a new trier. Where a trier of fact has been corrected for a number of serious errors there are bound to be strains on a second trial, conscious or unconscious, irrelevant to the issues, and hence disruptive. One may think one was not really wrong, and hence resist, consciously or otherwise, the new rules, or, conversely, lean over backwards. Alternatively, if one fully accepts the new principles it may be natural to overemphasize them.[18] Because of this we have sometimes remanded a case for trial before another judge, not as a reflection on the first, but to avoid such complications. This is particularly important where a prior error related to the quantum or burden of proof. *Murray* v. *United States*, 1 Cir., 1962, 300 F.2d 804; *Commissioner* v. *Young Motor Co.*, 1 Cir., 1963, 316 F.2d 267.

Judgment will be entered setting aside the judgment of the District Court and ordering the report of the special master to be vacated. Further proceedings to be not inconsistent with this opinion.

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[18] It should be unnecessary to say, but we do out of caution, that nothing stated in this opinion, or omitted therefrom, is indicative of our views on the merits, or is to suggest any particular result.

APPENDIX B

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1 so far as pertinent:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2 so far as pertinent:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18 so far as pertinent:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Com-

mission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning the holding all or a part of the stock subsidiary corporations, when the effect of such formation is not to substantially lessen competition . . .

Section 16 of the Clayton Act, 15 U.S.C. § 26, so far as pertinent:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that a danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . .

Appendix C

ORDER
July 13, 1961

WAZANSKI, J.

1. In this litigation the following procedural steps, among others, have taken place: (1) September 17, 1959 pursuant to Rule 42b of the Federal Rules of Civil Procedure, this Court ordered a separate trial on all issues other than the issues of damages raised by the pleadings; (2) on these other issues this Court held a trial and entered Findings of Fact, Conclusions of Law, and, on December 30, 1959 a partial final Decree (see 180 F. Supp. 125); (3) with some modifications, this judgment was affirmed by the Court of Appeals on December 2, 1960 (see 284 F. 2d 582). A petition for writ of mandamus having been sought to prohibit further hearings in this case, the Court of Appeals first granted a stay of the proceedings in this Court, next denied the requested relief, and today refused further to stay the proceedings in this Court, but on the contrary said that the Court of Appeals "do not wish to prolong" the interruption of proceedings in the District Court.

2. The only issues now being left for adjudication relate to damages. These are precisely analogous to issues of damages which would be raised in patent, copyright, and like cases following an appellate adjudication on issues of liability. Such cases are customarily referred to a Master for the ascertainment of damages.

3. In the light of the usual practice in parallel cases, and following the provisions of Rule 53 of the Rules of Civil Procedure, I have concluded that it is in the public interest and the interest of the parties that this case should now be sent to a Master. Among the reasons which have led me to make this reference are that the issues are complicated; they relate in part to details of accounting; and they

present questions which perhaps can be better dealt with not on successive, but on staggered days of hearing.

4. For the foregoing reasons, I refer this case to Derek Curtis Bok, Esq., whose office address is The Harvard Law School, Cambridge 38, Massachusetts, on all issues of damages. I direct him to find the facts, state his conclusions of law, and make any recommendations deemed by him appropriate for judicial action.

5. In performing his functions, he shall use the services of a court reporter to take a transcript of all the evidence and arguments before him, and shall preserve for the Court that transcript, together with all other evidence and exhibits.

6. He may begin the hearings at any time convenient to himself, but not later than October 2, 1961, and he shall file his report with the Court not later than August 31, 1962.

7. He may hold hearings in a courthouse or in any other suitable place to which the public may be given access, such as a public room at the Harvard Law School.

8. The Master shall exercise the power to regulate all proceedings in any hearing before him, to schedule them at times convenient to himself and the parties, and to do all acts and to take all measures necessary or proper for the efficient performance of his duties under the Order.

9. He may require the production before him of evidence upon all matters embraced in the reference, including all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence. He has the authority to put witnesses on oath. He may himself examine and may call the parties to the action and examine them upon oath.

10. For his services, the Master shall be paid $15.00 per hour for each hour spent either in hearing testimony and argument, or in preparation of his report. In addition, he shall be entitled to all his disbursements, including any

necessary secretarial assistance. He shall keep a record of the time and money he spends in connection with this case.

11. Unless the parties otherwise stipulate, the report of the master shall not be final, but the parties shall have the rights reserved to them by Rule 53.

CHARLES E. WYZANSKI, JR.
United States District Judge